

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY RAYCHARD MORGAN,

Defendant-Appellant.

UNPUBLISHED

June 24, 2014

No. 315467

Oakland Circuit Court

LC No. 2012-242262-FC

Before: DONOFRIO, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

Defendant Anthony Raychard Morgan appeals by right his jury convictions of assault with intent to do great bodily harm, MCL 750.84, and domestic violence, MCL 750.81(2). After the jury was unable to reach a verdict on the charge of torture, MCL 750.85, Morgan pleaded guilty to a second count of assault with the intent to do great bodily harm in exchange for dismissal of the torture charge. The trial court sentenced Morgan to serve 57 months to 10 years in prison for each assault conviction and to serve 93 days for the domestic violence conviction. Because we conclude there were no errors warranting relief, we affirm.

I. SENTENCING ERRORS

A. STANDARDS OF REVIEW

The sentencing guidelines are a comprehensive, integrated, and mandatory sentencing scheme; trial courts must score them and must score them properly. *People v Bemar*, 286 Mich App 26, 32, 34-35; 777 NW2d 464 (2009). This Court reviews de novo whether the trial court properly interpreted and applied the sentencing guidelines to the facts. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). And this Court reviews the trial court's findings underlying a particular score for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

B. BURN EVIDENCE

With regard to OV 3 and OV 7, Morgan argues that the trial court could not properly consider the evidence that he burned the victim approximately 50 times during the course of his criminal conduct when calculating his minimum sentence. Specifically, he maintains, because the jury was unable to reach a verdict on the charge that he tortured the victim and the burns

were the factual predicate for that charge, the evidence that he burned the victim could not be used to score these variables.

In *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009), our Supreme Court explained: “[o]ffense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable.” The Court concluded that, when reviewing the scoring of OV 9, this Court erred by considering the defendant’s conduct after he completed the acts for the sentencing offense:

If the prosecution had wanted defendant to be punished for fleeing and eluding, it should not have dismissed the fleeing and eluding charge. It would be fundamentally unfair to allow the prosecution to drop the fleeing and eluding charge while brokering a plea bargain, then resurrect it at sentencing in another form. [*Id.* at 134.]

The Court noted that the prosecution was free to charge a defendant with multiple offenses and the defendant would be sentenced for all offenses for which a conviction was obtained. *Id.* at 130.

The prosecutor charged Morgan with torture and the original assault with the intent to do great bodily harm on the basis of the evidence that he repeatedly burned the victim during the events at the victim’s apartment. The other charge of assault with the intent to do great bodily harm arose from Morgan’s attacks against the victim at his apartment, which included holding a knife to the victim’s genitals and threatening to cut her, terrifying her with Russian roulette, and choking her. The jury found Morgan guilty of the assault that occurred at his apartment, but could not reach a verdict on the torture or assault related to the burns he inflicted at the victim’s apartment.

After trial, Morgan pleaded guilty to the assault charge related to the burnings in exchange for the prosecution’s agreement to dismiss the torture charge. And the trial court specifically related that it was taking judicial notice of the facts established at trial as the factual basis for Morgan’s plea. Accordingly, the trial court could properly consider the evidence that Morgan repeatedly burned the victim when scoring the sentencing guidelines. *McGraw*, 484 Mich at 130.

C. JUDICIAL FACT-FINDING

Morgan also argues that the trial court engaged in impermissible judicial fact-finding, contrary to the decision in *Alleyne v United States*, 570 US ____; 133 S Ct 2151; 186 L Ed 2d 314 (2013). However, this Court has held that Michigan’s sentencing scheme does not implicate the decision in *Alleyne* and, for that reason, trial courts may consider facts not found by a jury in scoring offense variables. See *People v Herron*, 303 Mich App 392, 403-404; ____ NW2d ____ (2013). Therefore, this claim of error is without merit.

D. OV 7

Morgan contends that the trial court erred when it scored OV 7 at 50 points. Under this variable, a trial court must score 50 points if “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a). “Sadism” is defined as “conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender’s gratification.” MCL 777.37(3).

The trial court scored OV 7 at 50 points on the basis of the evidence that Morgan held a knife to the victim’s genitals and threatened to cut her and also threatened her with Russian roulette, which it found was conduct designed to substantially increase the fear and anxiety the victim suffered during the offense. “A trial court can properly assess 50 points under OV 7 if it finds that a defendant’s conduct falls under one of the four categories of conduct listed in subsection (1)(a).” *People v Hardy*, 494 Mich 430, 439-440; 835 NW2d 340 (2013). In *Hardy*, the Court determined what constituted conduct designed to substantially increase the fear and anxiety in a victim. *Id.* at 440. The Court stated that “it is proper to assess points under OV 7 for conduct that was intended to make a victim’s fear or anxiety greater by a considerable amount.” *Id.* at 441. “[A]ll relevant evidence should be closely examined to determine whether the defendant engaged in conduct beyond the minimum necessary to commit the crime, and whether it is more probable than not that such conduct was intended to make the victim’s fear or anxiety increase by a considerable amount.” *Id.* at 443.

During the first incident, Morgan made the victim undress, interrogated her, and then burned her after she answered. During the second incident, he again made the victim disrobe and forced her to lie on a bed. He held a knife to her genitals and threatened to cut her. He then made the victim move to the floor and lie on her stomach. After that, he told her that they were going to play Russian roulette. He sat on the victim’s back and the victim heard what she believed was a bullet being loaded into a gun. Morgan asked her three questions and when she answered he pulled the trigger. Morgan forced her back onto the bed and choked her while stating that she needed to die. He choked her for a couple seconds and then let go. He related that if he continued to do that for 20 minutes, she would die or black out.

The evidence established that Morgan’s conduct went beyond the minimum necessary to commit an assault with the intent to do great bodily harm. Morgan could have completed the first incident by threatening the victim with the hair straightener or burning her just once, see *People v Russell*, 297 Mich App 707, 721; 825 NW2d 623 (2012), but he went far beyond that minimum. He deliberately humiliated her by forcing her to undress and answer questions about her relations. During this interrogation, Morgan burned the victim on her wrist, arms, hips, thighs, butt, breasts, stomach, and vagina. At one point, the victim had to use a pillow to muffle her screams. And during the incident at his apartment, Morgan went to great lengths to terrify the victim. He did not merely brandish a knife, he forced her to strip and then placed the knife next to her genitals and threatened to cut her so that no man could ever be with her again. He also tormented her with a game of Russian roulette and choked her over and over while telling her that she would black out or die. This evidence plainly supported the trial court’s finding that Morgan intended to increase the victim’s fear or anxiety by a considerable amount. *Hardy*, 494 Mich at 444-445. This evidence also supported a finding that Morgan engaged in sadism. MCL

777.37(3). The record adequately supported the trial court's finding that Morgan burned the victim and used a knife or gun. The trial court properly scored OV 7 at 50 points.

E. OV 3

Morgan also challenges the trial court's decision to score OV 3 at 10 points. Under OV 3, the trial court had to score 10 points if "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). As already explained, the trial court could properly consider the evidence that Morgan burned the victim and there was testimony that her burns required medical treatment. Therefore, the trial court properly scored this variable.

F. OVS 1 AND 2

Morgan next argues that the trial court erred when it score OV 1 at 15 points and OV 2 at 5 points. The trial court had to score 15 points under this variable if "[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon." MCL 777.31(1)(c). Under OV 2, the trial court must score five points if "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(1)(d).

On appeal, Morgan contends that there was insufficient evidence that he used a knife or gun during the sentencing offense. The victim's testimony that Morgan held a knife to her and tormented her with what she thought was a gun was sufficient to support the trial court's findings by a preponderance of the evidence. *Hardy*, 494 Mich at 438. The trial court properly assessed 15 points under OV 1 and properly assessed 5 points under OV 2.

G. OV 8

Morgan next challenges the assignment of 15 points under OV 8. The trial court had to assess 15 points for this variable if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). Here, there was evidence that Morgan asported the victim to a place of greater danger or held her captive beyond the time necessary to commit the offense. "Asportation does not require force; asportation for the purpose of OV 8 may occur even when the victim voluntarily accompanied the defendant to a place or situation of greater danger. A place of greater danger includes an isolated location where criminal activities might avoid detection." *People v Dillard*, 303 Mich App 372, 379; ___ NW2d ___ (2013) (citations omitted). The victim testified that, after Morgan burned her at her apartment, Morgan went with the victim to his apartment where he continued the assault. The victim testified that she went because she was scared. Morgan's apartment was a place of greater danger because no one was there to help her, such as the victim's sister. Moreover, the evidence established that during both incidents, Morgan held the victim captive beyond the time necessary to commit the offenses. He held her for approximately two hours while he burned her around 50 times. When they returned to Morgan's apartment, he held her for approximately four or five more hours while he repeatedly assaulted her. The trial court properly assessed 15 points for OV 8.

H. OV 10

Morgan also challenges the trial court's decision to assign 10 points for OV 10. Under OV 10, the trial court must assign 10 points if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). "The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability." MCL 777.40(2). "'Exploit' means to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). "[T]o be exploited the victim must actually have been vulnerable." *Dillard*, 303 Mich App at 380. "'Vulnerability' means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). The trial court found that Morgan exploited the fact that he was still married to the victim and had a child with her to facilitate his assaults.

Morgan contends that he no longer had a domestic relationship with the victim and, therefore, she was not vulnerable on that basis. "[T]o qualify as a 'domestic relationship,' there must be a familial or cohabitating relationship." *People v Jamison*, 292 Mich App 440, 447; 807 NW2d 427 (2011). Although Morgan lived separately from the victim, they were still married and had a child together. Further, despite dating other people, they still occasionally had sexual relations and Morgan controlled the victim's finances. Thus, there was a familial relationship. *Id.*; see also *Dillard*, 303 Mich App at 380-381 (concluding there was a domestic relationship between the victim and the defendant where they were dating and had a child together). The evidence also showed that Morgan exploited the relationship to get the victim to come to his apartment. Accordingly, the trial court did not err when it scored this variable at 10 points.

I. OV 4

Finally, Morgan challenges the assignment of 10 points to OV 4. Under OV 4, the trial court must assess 10 points if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). MCL 777.34(2) provides: "Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive."

The victim testified that she had been told that she needs counseling, she is emotionless, and she was mentally scarred. Since the incident, she watches her back at all times and does not leave the house. She also has difficulty trusting people. The author of the presentence investigation report indicated that the victim "is seeking psychological treatment as a result of significant depression and anxiety stemming from the instant offense." And the trial court could rely on the report to establish this fact. *People v Nix*, 301 Mich App 195, 205 n 3; 836 NW2d 224 (2013). Morgan contends that the victim's psychological injuries were not serious. However, this Court has held that a score of 10 points was proper where the victim indicated that he suffered from depression and his personality changed, *People v Ericksen*, 288 Mich App 192, 203; 793 NW2d 120 (2010), and where the victim testified that she was fearful during the incident, *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). The trial court properly assessed 10 points under OV 4.

There were no errors warranting relief.

Affirmed.

/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly